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Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)
)
Amendment of Part 1 of the)
Commission's Rules --)
Competitive Bidding Proceeding,)

WT Docket No. 97-82

To The Commission:

**REPLY COMMENTS OF AIRADIGM COMMUNICATIONS, INC.; LOLI, INC.; KMC
INTERACTIVE TV, INC.; MAR IVDS, INC.; NEW WAVE PCS, INC.; AND EUPHEMIA
BANAS TO THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING**

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INTRODUCTION

Airadigm Communications, Inc., Loli, Inc., KMC Interactive TV, Inc.; MAR IVDS, Inc.; New Wave PCS, Inc.; and Euphemia Banas (collectively "Companies") acting through their counsel, hereby submit their comments in the above-captioned proceeding. Loli, Inc. holds IVDS licenses in several locales throughout the nation. KMC Interactive, Inc. holds five IVDS licenses, mainly in Ohio. MAR IVDS, Inc. holds four IVDS licenses in New England and the Midwestern states. New Wave PCS, Inc. holds a PCS license in Hawaii. Airadigm Communications, Inc. holds PCS licenses in Wisconsin. Euphemia Banas holds IVDS licenses in the Midwestern United States.

Companies ask the Commission to consider its statutory mandates and the comments of other commenters in adopting rules to ensure that small businesses have the opportunity to participate in future auctions. Small businesses face enormous challenges in obtaining the requisite financing to participate in auctions and construct their systems. Companies join the majority of commenters in supporting Commission proposals that would assist small businesses by: (1) extending the late payment period and grace period; (2) limiting the disclosure of individual financial information; (3) requiring second downpayments only after petitions to deny have been resolved; (4) simplifying the attribution analysis; (5) rejecting a cross-default provision; (6) continuing to use the existing service specific rules currently in place; (7) rejecting proposals to require linking the upfront payment to the amount bid and making a separate upfront payment for each license; and (8) granting investors the ability to invest in, or engage in discussions with, other applicants once the applicant they originally supported withdraws its bid.

A. The Grace Period Should Be Extended and the Late Payment Fee Reduced

In its Comments, Companies argued against the Commission's proposed 90-day grace period followed by an additional 90 days and a 15 percent late payment. Several commenters argued that the Commission should provide only a ten day grace period¹ and a more onerous payment fee² for businesses requiring these forms of assistance. Companies maintain that a 90-day grace period without a late payment fee, followed by a second 90-day period with a five percent fee, and a third 90-day period with a ten percent fee is the most appropriate arrangement.

There is no justification for a short grace period or a severe late payment. Winning bidders are not attempting to gain an advantage by postponing an installment payment. They have invested substantial time and resources bidding in an auction and provided large amounts of funds to cover their upfront payment and downpayments. Any delay in meeting an installment payment deadline is simply an inability to pay at that point in time. A ten or 30 day grace period or late payment period does not provide sufficient time for a licensee to obtain the necessary financing. A late payment fee that takes effect immediately after the payment deadline will especially hamper small business licensees' ability to obtain the necessary financing because the fee must be paid at the precise point when the licensee lacks funds. If the licensee does not have funds to make the installment payment, it will not have funds to make the late payment. If it uses funds set aside for the installment payment to pay the late payment, then it must raise an even greater amount of money to make the installment payment. The licensee needs time to arrange additional financing for the installment plan payment and the late payment fee.

¹ See Joint Comments of the Coalition of Institutional Investors at 16 ("Coalition of Institutional Investors"); and Airtouch Paging and Powerpage, Inc. ("Airtouch") at 7-8.

² See Comments of Mountain Solutions, Ltd., Inc. at 3 (automatic 5% late payment fee); Coalition of Institutional Investors at 16 (5% late payment fee); and Hughes Electronic Corporation at 8 (5-10% late payment fee).

B. Disclosure of Ownership Information Should Be Permitted, So Long As Personal Net Worth Is Not Disclosed

After reviewing the comments of several commenters who requested disclosure of ownership information,³ Companies believe that disclosure should be required. However, Companies urge the Commission to eliminate the requirement to disclose personal net worth in all services. Disclosure of personal financial information as part of the public record or over the Internet could discourage individual applicants from participating in auctions.

C. Licensees Should Be Required to Make Second Downpayments Only After All Petitions to Deny Have Been Resolved

Companies contended that the Commission should require second downpayments only after the disposition of all petitions to deny licenses.⁴ The Commission suggested requiring all designated entities to make their second downpayments at the same time, regardless of whether they had any petitions to deny filed against them.⁵ A small number of commenters supported this view.⁶ Companies maintain that licensees should only have to make second downpayments after the status of their licenses has been determined. In the absence of such a rule, applicants' money may be tied up for months pending the resolution of outstanding petitions to deny. During this time, licensees could not construct their systems. They would encounter difficulties attracting additional financing because the status of their licenses would remain uncertain and most investors require finality on the acquisition of a license as a precondition to finalize financing arrangements.

³ See Comments of Personal Communications Industry Association ("PCIA") at 4; Paging Network, Inc. ("PageNet") at 6.

⁴ See Commenters of Companies at 13.

⁵ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 97-82, ¶ 65 (released February 28, 1997) (hereinafter "Notice").

⁶ See PCIA at 5; Airtouch at 9.

D. The Installment Plan Interest Rate Should Be Calculated at the Date Licenses Are Granted

Companies stated in their Comments that the interest rate on installment payment plans should be calculated using the yield from the last Treasury note auction at the time the licensee receives its license grant, because this most closely reflects the point at which the government lends the licensee money.⁷ The Commission and a few commenters advocated using the interest rate at the date of the public notice announcing the close of the auction.⁸ Companies continue to believe that the Commission should use the interest rate at the time the Commission grants the license to the licensee because this is the date on which the Commission actually lends money to licensees. This would provide the most accurate reflection of the government's actual cost of money.⁹

E. The Commission Should Provide Clear Standards for Maximum Allowable Investment Under the "Controlling Interest" Standard

The Commission suggests adopting a new standard for determining the financial size attribution of interests. It proposes to abandon the "control group" structure and use a "controlling interest threshold," whereby interests would be attributable if they exercise *de jure* or *de facto* control of the applicant.¹⁰ Companies applaud the Commission's efforts to simplify the current "control group" standard. However, it is more important for the Commission to craft new rules that foster small businesses' ability to obtain financing from large investors. Furthermore, the Commission must incorporate exact thresholds and limits in the rules. Without the certainty of knowing how investors' and affiliates' interests will be attributed, investors may

⁷ See Comments of Companies at 7.

⁸ See Notice at ¶ 38; Comments of Merlin Telecom, Inc. at 13-14; Coalition of Institutional Investors at 12.

⁹ Companies reserve the right to challenge the Commission's previous determinations of interest rates.

¹⁰ See Notice ¶ 28.

be reluctant to maximize investments and small businesses will be unable to finalize financing arrangements.

F. The Commission Should Not Adopt A Cross-Default Provision

In the *Notice*, the Commission sought comment on whether it should adopt a cross-default provision that would apply to licensees' other installment plan loans, even across services.¹¹ Commenters appear divided as to whether the Commission should adopt such a cross-default provision.¹² Companies strongly oppose the adoption of a cross-default provision. Separate legal entities under common ownership should not be placed at risk for circumstances unrelated to their individual operations. Defaults in such a situation would be unfair to investors who invested in a legal entity without knowledge of extenuating circumstances that could adversely affect their investment.

A cross-default rule would have an enormous impact on the telecommunications industry as a whole. Often companies arrange separate financing for separate regional affiliates, as well as for specific services. Investors would be reluctant to invest in entities entering auctions or constructing systems because they could lose their investment without warning and without any ability to evaluate the risk of potential losses prior to investing. Since small businesses are often the beneficiary of the Commission's installment payment plans, a cross-default provision would further undercut small businesses' ability to participate in the wireless communications market.

¹¹ See *Notice* at ¶ 78.

¹² See Comments of Merlin Telecom at 26 (opposing cross-default provision); Airtouch at 9 (supporting cross-default provision); Cook Inlet Region, Inc. ("Cook Inlet") at 15-16 (supporting cross-default provision); and Pocket Communications, Inc. ("Pocket") at 11 (opposing cross-default provision).

G. The Ability to Use Existing Service-Specific Rules Should Be Retained

The majority of commenters favored retaining the rules in place for existing services. Companies agree with these commenters and oppose the Commission's proposal to replace the existing service specific rules with the generic competitive bidding rules. The existing services all have vastly different capital requirements, which a uniform set of rules could not properly take into account. Furthermore, it would be unfair to allow one group of players in the same service to benefit, or be disadvantaged, by operating under a different set of rules from its competitors.

H. The Upfront Payment Should Not Be Tied to the Amount of a Licensee's Bid and Licensees Should Not Be Required to Pay an Upfront Payment For Each License

A few commenters suggested linking bidders' upfront payments to the amount of their outstanding bid during an auction. They propose requiring bidders to maintain an upfront payment of five percent of their outstanding bid and if the percentage should fall below four percent, the bidder would have either five or ten business days to raise the amount back above six percent.¹³ Commenters strongly oppose this proposal because it would greatly hurt small businesses who will not be able to raise additional amounts of money on such short notice. Small businesses will be unable to change their bidding strategies during the auction due to these fiscal constraints and consequently licenses will not go to the entities that value them the most. Small businesses require certainty that comes with knowing the amount of their downpayment before they enter an auction so they can secure adequate financing. Linking the upfront payment to the bid amount would create an insurmountable barrier to entry for small businesses.

¹³ See Comments of Coalition of Institutional Investors at 11 (suggesting ten business days to increase upfront payment amount above six percent of the bid amount); Airtouch at 6-7 (proposing five business days to increase upfront payment amount above six percent of the bid amount).

Similarly, several commenters suggested requiring a separate upfront payment for each license on which an entity bids.¹⁴ Companies believe that this would defeat the underlying purpose behind allotting licenses by auction: putting licenses in the hands of the people who value them the most. Requiring a separate upfront payment for each license would force potential bidders to decide at the start of an auction the licenses on which they will bid. It would limit bidders' flexibility to change strategy and force them to reveal their bidding strategy prior to the start of the auction. Bidders would be unable to bid on different licenses if they decided that they valued a particular license more than the licenses for which they had submitted an upfront payment.

I. The Commission Should Adopt Rules Concerning Withdrawn Bids Designed to Foster Small Business Participation

In its *Notice*, the Commission proposed modifying its anti-collusion rule to permit holders of non-controlling attributable interests to invest in another applicant if the applicant they originally invested in withdraws its bid.¹⁵ The Commission also sought comment on whether they should create a "safe harbor" to permit incumbent operators to engage in discussions among bidders concerning mergers, acquisitions, or intercarrier agreements during the period in which the anti-collusion rules apply.¹⁶ Numerous commenters supported the "safe harbor" proposal.¹⁷

Companies support the Commission's proposal to modify the anti-collusion rule in order to permit entities holding a non-controlling attributable interest to invest in another applicant once the original applicant withdraws its bid. This modification would pose little danger of

¹⁴ See Comments of Coalition of Institutional Investors at 11; PageNet at 10.

¹⁵ See *Notice* ¶101.

¹⁶ See *Notice* ¶102.

¹⁷ See Comments of Coalition of Institutional Investors at 19; PageNet at 14; Airtouch at 12; Metrocall, Inc. at 6; and AT&T Wireless Services, Inc. at 7.

fostering collusive activities. Investors would be unable to "game" the auction by colluding among bidders because they would be prohibited from investing in more than one player and would be unable to obtain information about more than one bidder. In contrast, the "safe harbor" rule would permit investors to obtain information about more than one bidder during the bidding phase of an auction. Companies oppose this proposal because they believe a certification requirement is insufficient to discourage collusive activities that could result from implementation of a "safe harbor" provision.

The Commission proposes allowing entities to invest in a second applicant for a license in the same market as the original applicant the entity supported, if the original applicant first withdraws from the auction.¹⁸ Companies expressed their approval of this position in their comments and continue their support, despite the comments of a few commenters who oppose this proposal.¹⁹ The Commission's proposal would attract the necessary investors and capital to small businesses bidding in auctions.

In its comments, Companies argued that the Commission should continue its practice of refunding upfront payments when a bidder withdraws from an auction.²⁰ A single commenter suggested that the Commission hold onto a portion of the refunded upfront payment as an administrative fee.²¹ Companies strongly oppose this proposal. The government is already reaping a profit through the interest earned on the funds bidders deposit as upfront payments. Bidders are deterred already from withdrawing their bids because they would lose the time and resources expended formulating their bid, as well as the interest on, and the time value of, the

¹⁸ See Notice ¶101.

¹⁹ See Comments of PageNet at 15; Nextel Communications, Inc. at 9.

²⁰ See Comments of Companies at 12.

²¹ See Comments of Airtouch at 7.

money they place as a downpayment. Further, administrative fees are set by statute and Congress has not determined that a fee is required for auction participation.

J. The Commission Should Adopt Rules to Ensure That Small Businesses Have the Opportunity To Participate in Competitive Bidding

Section 309 (j) of the Communications Act of 1934, as amended, requires the Commission to distribute licenses to a wide array of licensees, including small businesses. The Commission must also eliminate barriers to entry for small businesses and entrepreneurs.²² Companies strongly believe that the Commission must offer bidding credits in addition to installment payment plans to enable small businesses to participate in auctions.²³ A single commenter suggested that the Commission should offer bidding credits in lieu of installment payment plans.²⁴ Although that commenter's suggestion was conspicuous for its solitude, Companies wish to stress their strong opposition to this proposal. Small businesses desperately need both bidding credits and installment payment plans. Small businesses currently experience great difficulties attracting investors and capital. Changes in the control group structure may make it more difficult for small businesses to attract investors and financing over a long period of time. The combination of substantial bidding credits and installment payment plans with favorable terms enables small businesses to compete on a level playing field with larger entities.

A single commenter suggested that small businesses be required to submit audited financial statements.²⁵ Companies have argued that a requirement to submit audited financial statements is too great a burden for small businesses and that the Commission should allow them

²² 47 U.S.C. § 257.

²³ See Comments of Companies at 8.

²⁴ See Comments of Cook Inlet at 11.

²⁵ See Comments of PageNet at 9.

to submit unaudited financial statements.²⁶ Small businesses often operate on a tight budget in which accounting fees may take up much needed funds that could be applied towards constructing a service system. Accordingly, Companies believe that entities with a net worth under 75 million dollars should not be required to submit audited financial statements.

²⁶ See Comments of Companies at 3.

CONCLUSION

Companies and the majority of commenters support the Commission's efforts to follow its statutory mandates and formulate rules for competitive bidding that will ensure small business participation. Through the adoption of rules that assist small businesses in their efforts to obtain financing and capital, and by promoting certainty in the auction process, the Commission can provide small businesses the opportunity to participate in the competitive bidding process and operate successful business ventures once they acquire licenses.

Respectfully submitted,

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